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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 385

ELMER G. PAXTON,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Kansas, entered in the above entitled case on May 11, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas (R. 143), printed in Appendix B hereto, is reported in 201 Kan. 353, 440 P.2d 650. The opinion of the Supreme Court of the State of Kansas on rehearing (R. 154), printed in Appendix B hereto, is unreported at this date.

JURISDICTION

The judgment of the Supreme Court of the State of Kansas was entered on May 11, 1968. R. 143, p. A2, *infra*. Rehearing was denied on June 19, 1968. R. 154, p. A20, *infra*. The jurisdiction of this court is invoked under 28 U.S.C. §1257 (3) [since rights, privileges and immunities under the Constitution are claimed to have been infringed].

QUESTIONS PRESENTED

1. Whether fair trial by jury and due process of law are denied, in violation of the 6th and 14th Amendments to the Constitution, where in a criminal case:

a) after motion for change of venue is overruled, the examination of jurors on voir dire indicates that discussion of the case prejudicial to the accused has pervaded the community, and all or nearly all jurors called have heard or participated in such discussion;

b) in a community having only 1200 qualified potential jurors including women, there exists systematic exclusion of women from jury service, thus reducing substantially the number of available persons for jury service and resulting in a jury that is at best a cross section of the male population of the community only;

c) the trial judge, intervening in voir dire examination of jurors, incorrectly instructs a juror on the burden of proof and presumption of innocence, although correct instructions in this regard are given at the conclusion of the trial without reference to the earlier incorrect comments;

d) the trial judge states in the presence of the jury that the evidence in the case will be basically the same as that in a prior case in which a conviction resulted in the same county;

e) in overruling a challenge for cause directed at a juror who five times indicated on voir dire that the failure of a defendant to testify might influence his verdict;

f) in requiring a defendant to show affirmatively that he is prejudiced in being required to utilize peremptory challenges allowed by law to remove persons against whom challenges for cause were erroneously overruled;

g) subsequent to the trial it appears that a member of the trial jury is related to a person in the community who was the victim of an offense similar to the one allegedly committed by the defendant, and involving persons allegedly associated with defendant in the crime charged, and a motion for new trial predicated in part thereon having been overruled;

h) the trial court refuses to grant a mistrial following irrelevant comments by state's witnesses and state's attorney disclosing offenses by state's witnesses unrelated to the accused, but tending to prejudice the accused in the eyes of the jury by virtue of his association with such state's witnesses;

i) the trial court states in the presence of the jury that neither the court reporter, county attorney nor the court could understand testimony of a key witness for the defense.

2. Whether due process of law is denied in allowing a conviction to stand where evidence of a conspiracy which was necessary to proof of the offense charged was circumstantial at best, when in fact certain state's witnesses, who were necessarily parties to such alleged conspiracy, did not

testify to the existence of any conspiracy or agreement, in spite of the fact that such witnesses could claim no privilege in respect thereto, since they were not charged with this offense and could not have been so charged, the statute of limitations having expired.

3. Whether due process of law is denied where the State Supreme Court considers an affidavit of a juror, filed during the pendency of the appeal and without opportunity for cross-examination by the accused, having a bearing on the juror's knowledge of the circumstances of an offense similar to the offense in question.

4. Whether the evidence was so totally insufficient to support a conviction as to deny petitioner due process of law.

STATUTES INVOLVED

Section 21-551, Kansas Statutes Annotated, is the Statute under which Petitioner was prosecuted. Sections 43-116 and 43-117, Kansas Statutes Annotated, are involved in the question presented herein relating to exclusion of women from the panel of jurors. All statutes are set out in Appendix A hereto.

STATEMENT

In April, 1967, Petitioner was tried and convicted in the District Court of Lane County, Kansas, of obtaining money by false pretenses (K.S.A. 21-551) from one C. W. Monroe at Dighton, Kansas, on December 12, 1962. This was the second trial of petitioner, the first having resulted in a mistrial for failure of the jury to agree three months earlier. Some time prior to that trial, one Richard Barker

had been tried and convicted in the same Court on a like charge arising out of the same transaction.

The trial was in Dighton, in Lane County, Kansas; Lane County has a total population of 3077 persons and of this number about 1200, including women, were eligible jurors (R. 6, Appendix C, A22, A23). Women were not included in the box from which prospective jurors names were drawn (R. 6, Appendix C, A23). Petitioner challenged the array for exclusion of women jurors (R. 6, Appendix C, A24). The challenge was overruled, the trial court finding that the exclusion resulted from the fact that women were customarily not asked whether they desired to serve (R. 7, Appendix C, A25).

Petitioner moved for change of venue, alleging that because of the size of the community and the common knowledge of the matter in question in the community, a fair and impartial jury could not be selected in Lane County (R. 3). This motion was overruled.

A total of forty-three jurors were called for examination on voir dire. Several were excused for having an opinion in the case, others as relatives of the complaining witness and as relatives or employees of the sheriff, county attorney or a state's witness, and some upon indication that they could not be fair to petitioner if he did not testify. Others who were not excused indicated that they had heard and participated in discussion of the case in the community (R. 8-26). The general character of the discussion in the community was demonstrated by comments made by various jurors during voir dire, such as: "I don't like to see people swindled" (R. 23), "I would have to hear what the other side said about it" (R. 17), "They just told me how they got the job done" (R. 20), and that Sheriff Marsteller had given one juror "a pretty good rundown on what he thought the results should be" (R. 13). Juror Albert

Ehmke five times indicated that the fact a defendant did not testify might prejudice him toward the defendant: "It might make a difference" (R. 11, Appendix C, A26), "I think the evidence would have to show at least why he didn't take the stand." (R. 11, Appendix C, A26), "this has always been a sore point with me." (R. 11, Appendix C, A27), "I can't see why an innocent man can't say so." (R. 11, Appendix C, A27), "I'm afraid it might" [leave some reservation] (R. 11, Appendix C, A27). Petitioner's challenge of Juror Ehmke for cause was overruled (R. 12, Appendix C, A27), and he served as a trial juror. Another member of the trial jury was related by affinity to the wife of the complaining witness, but unfortunately was not challenged. During voir dire, the trial court excused one juror who had been a juror on the earlier Barker case, making the comment in the presence of the jury that the evidence would be the same in the present case. On objection by petitioner, the court amended his statement by saying that the evidence would be similar, with the same complaining witness (R. 11, Appendix C, A26). At another point during voir dire, the court intervened to point out that petitioner would not be entitled to the presumption of innocence if the state established its case, and that petitioner would be required to put in evidence in that event (R. 15, Appendix C, A31). The court properly covered the presumption of innocence in his instructions to the jury at the conclusion of the trial, but made no reference at that time to the earlier comment during voir dire (R. 97).

The evidence developed that petitioner and his associates, two of whom testified as state's witnesses, sold Mr. C. W. Monroe a treatment of his house for wood rot. The state's theory of trial was that the house was not in need of such treatment and proper chemicals to provide such treatment were not used, and that petitioner's repre-

sentations to Mr. Monroe that a proper treatment had been provided constituted the crime of false pretenses. The only evidence as to the presence or absence of wood rot or proper chemicals in the treatment at the time of the alleged offense, was that of a state's witness who testified that they were carrying proper chemicals with them (R. 48, 50), and the testimony of the complaining witness that one of petitioner's associates (Barker) went under the house and returned with what he said was a sample of the wood rot present (R. 27), this statement being made in the presence of petitioner. Complaining witness testified that he could smell diesel fuel and "something else" while the house was being sprayed (R. 29) and it was established that a proper treatment would be 5% pentachlorophenol (which has a very pungent odor) in a diesel fuel base (R. 44, 48, 52, 58). Evidence given by expert witnesses for both the state and defense as to the presence of evidence of wood rot or proper chemicals, based on examinations of the house approximately two years or more after the alleged offense, was in conflict.

There was no evidence that petitioner had or claimed to have direct personal knowledge of the facts pertaining to the presence of wood rot or the use of proper chemicals for treatment. The evidence indicated that he did not personally inspect the underside of the house and was not present when the treatment was applied. No evidence was offered of any conspiracy or agreement to defraud involving petitioner, although two persons, Ulmer and Woodard, who would necessarily have been parties to any such conspiracy or agreement, testified as witnesses for the state. Neither Ulmer (R. 36) nor Woodard (R. 46) were ever charged with any offense arising out of this transaction, nor could they have been at the time of trial since the statute of limitations had expired. No evidence was offered to show that petitioner knew, or had reason to know,

that conditions were not as he represented them to be, if in fact they were not.

During the trial, the state developed the facts that Ulmer and Woodard had both been in the penitentiary (R. 29, 45, 68), queried whether Woodard's license as a termite exterminator had been terminated by the state (R. 43) and finally queried Woodard as to the circumstances which caused a termination of his relationship with petitioner (R. 44). Upon objection at this point by the defense (R. 44) the State's attorney stated in the presence of the jury that it was his purpose to present any continued dealings showing the same type of operation (R. 44, Appendix C, A35). At this point defense counsel moved a mistrial, which was denied (R. 44, Appendix C, A35). State's counsel then withdrew the line of questioning and the jury was instructed by the court to disregard anything with regard to any other dealings between Woodard and Appellant (R. 44, Appendix C, A35).

At the conclusion of the direct testimony of Dr. David Hart, an expert witness for the defense in the field of chemistry, the state requested a recess overnight so the testimony could be transcribed. The court denied this request and stated, in the presence of the jury, that there was no more chance that the reporter could read the scientific terms used by the witness than there was that the state's attorney or the court could understand them. (R. 92, Appendix C, A36).

The defense moved for discharge for failure to prove the crime charged, both at the conclusion of the state's evidence and of all the evidence, both times being denied (R. 80, 95). The jury found defendant guilty of the crime charged on April 28, 1967, and the trial court sentenced defendant to the penitentiary for not to exceed 5 years (R. 107).

On motion for new trial, petitioner urged, in addition to error based upon all objections heretofore mentioned, that newly discovered information disclosed that a juror, Albert Ehmke, was related to a resident of the community who was the victim of a crime similar to the one with which petitioner was charged, and involving one of petitioner's associates who was a witness for the state against petitioner (R. 103, 104). Motion for New Trial was overruled.

On appeal to the Supreme Court of the State of Kansas, all questions presented here as being denial of fair trial by jury were presented in essentially the same form, and the question of sufficiency of the evidence was raised (R. 109, 110). The state filed and included in its counter-abstract of the record an affidavit of juror Albert Ehmke disclaiming knowledge of the transaction referred to in the preceding paragraph herein (R. 141), and the Supreme Court considered and commented upon this affidavit in its opinion affirming the conviction (R. 147, Appendix B, A14). On motion for rehearing, petitioner urged denial of due process in this procedure, where petitioner had no opportunity to cross-examine affiant (R. 151). The Supreme Court denied rehearing, but struck the paragraph referring to the aforementioned affidavit, substituting another paragraph therefor (R. 155, Appendix B, A21).

The Supreme Court further held, in its opinion affirming petitioner's conviction, that where challenges for cause directed at jurors Jerel Barnett and Albert Ehmke were overruled, and where petitioner subsequently excused Barnett via peremptory challenge and offered no explanation for his failure to excuse Ehmke by the same means, petitioner was in no position to complain of the trial court's ruling on the challenges for cause (R. 146, Appendix B, A11).

On motion for rehearing, petitioner urged that such a position was inconsistent with the position taken by this court that the right to challenge certain jurors without showing cause cannot be abridged (R. 150). The Supreme Court did not comment on this issue in denying rehearing (R. 155, Appendix B, A21).

REASONS FOR GRANTING THE WRIT

1. The court below rejected application in this case of the principles of *Sheppard* v. *Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966), holding that any attempt to analogize the facts of this case to *Sheppard* was "unthinkable" since there was no showing of prejudicial newspaper, radio or TV coverage prior to or during the trial (R. 146, Appendix B, A9). Certainly it is true that the recent decisions in which this court has announced the principles by which fair trial rights of an accused must be guarded against the massed effect of prejudicial publicity have dealt with situations arising from a barrage of publicity through the mass media. *Sheppard* v. *Maxwell*, supra; *Estes* v. *Texas*, 381 U.S. 532, 14 L. Ed. 2d 543, 85 S. Ct. 1628 (1965); *Rideau* v. *Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963); *Beck* v. *Washington*, 369 U.S. 541, 8 L. Ed. 2d 98, 82 S. Ct. 955 (1962); *Irvin* v. *Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). It can hardly be gainsaid, however, that the tap roots of these cases lie deep in the principle that a fair trial cannot be had where there exists a reasonable likelihood that the verdict of a jury will be affected by prejudice arising from community sentiment. Yet the decision below indicates a dangerous tendency to limit the scope of these decisions by looking to cause, rather than effect; to apply *Sheppard* and its predecessors *only* where media coverage is involved.

Thousands of criminal trials occur annually in the small communities of this nation—communities just such as Dighton, Kansas. Most such trials are of insufficient statewide or regional concern to attract the attention of the daily newspapers and broadcasting media, located in the distant cities. Yet the record here demonstrates that in such cases sufficient local discussion may be, and is in fact, generated through the unrecorded medium of rampant rumor and hearsay in the corner coffee shop and across the back yard fence to result in the same effect at the jury level as that produced in the *causes celebre* by the mass media. *In no case can the simple expedient of change of venue be a more effective agent in securing the ends of justice.* The voir dire in this case provides a clear picture of the prevailing community sentiment before and during this trial, and this record provides an appropriate medium for this court to establish clearly that the principles of *Sheppard* apply not only on the highways, but in the byways of this nation as well.

2. In view of the pervasive community sentiment running against petitioner at the time of his trial, as demonstrated by the record, the action of the Supreme Court of Kansas in approving the actions of the trial judge during the trial would seem in direct conflict with the injunction of this court that under such circumstances "the trial courts must take strong measures to ensure that the balance is never weighed against the accused." *Sheppard v. Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966). The trial judge virtually opened the trial by advising the jurors that the evidence would be the same as that in an earlier case in which a conviction had occurred in the same community (R. 11, Appendix C, A26), immediately thereafter verbally twisted the arm of a juror who had five times stated that the failure of petitioner to

testify would affect his verdict, until the juror agreed that he would disregard that factor (R. 11, 12, Appendix C, A27) and, still on voir dire, incorrectly stated the law as to the presumption of innocence and burden of proof (R. 15, Appendix C, A31) leaving the jury, already aware of the sentiment of the community, with the understanding throughout the trial that petitioner would be expected to offer evidence of his innocence. During the trial, the court "cured" the conduct of the prosecutor in persisting in the attempted development of irrelevant facts tending to prejudice the jury against petitioner by refusing a requested mistrial and simply instructing the jury to disregard (R. 44, Appendix C, A35). As a final touch during the trial proper, the court commented in the presence of the jury that the testimony of a key defense witness, an expert in chemistry, was, in effect, incomprehensible (R. 92, Appendix C, A36), a comment referred to by the State Supreme Court as "injudicious in nature, but not prejudicial." (R. 147, Appendix B, A13). Finally, the trial court was apparently unimpressed by the fact that one of the trial jurors may have had knowledge of a similar previous incident involving a relative of the juror and one of petitioner's associates (R. 103, 104). This matter should have taken added importance from the fact that this was the very same juror, Albert Ehmke, who had on voir dire voiced over and over again his reservations against a defendant who did not take the witness stand.

Not only does the approval of these actions of the trial judge by the State Supreme Court conflict with the principles laid down by this court in *Sheppard*, it further, so far as the situation regarding juror Ehmke is concerned, runs head on against the rule forbidding comment on the silence of the accused. *Griffin* v. *California*, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965). If comment by

the prosecution on the failure of an accused to testify is inherently prejudicial, how much greater the demonstrable prejudice where there sits on the jury a man who by his own admission is biased against the accused who does not testify. The opinion of the Supreme Court tends to gloss over this incident (R. 146, Appendix B, A10), but the record is clear (R. 11, 12, Appendix C, A26, A27) that this juror, having expressed his reservations in as many ways as he perhaps knew, finally gave in when pressed by the trial judge to a choice of saying he would follow the court's instructions or telling the court he would not do so. Perhaps no record presented to this court will offer a clearer opportunity for the court to consider the care which must be given in interrogation of jurors on *voir dire*, or to amplify what this court meant in stating that "no doubt each juror was sincere when he said that he would be fair . . ., but the psychological impact requiring such a declaration before one's fellows is often its father." *Irvin* v. *Dowd*, 366 U.S. 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639 (1961).

3. Squarely presented by this record is the question whether due process of law and fair trial by jury are denied where women are excluded from the jury panel by a failure of local officials in carrying out their duties under the state law, thus rendering the jury less than a fair cross section of the community. This court has in the past considered the question of exclusion of women and has not held the constitution violated thereby. *Strauder* v. *West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879); *Fay* v. *New York*, 332 U.S. 261, 91 L. Ed. 2043, 67 S. Ct. 1613 (1947); *Hoyt* v. *Florida*, 368 U.S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961). In *Hoyt*, however, the issue was not squarely presented, this court finding that the state was in fact making a reasonable attempt to include women on jury panels. In the past two years, lower courts have split on the issue

of total exclusion. In *White* v. *Crook*, 251 F. Supp. 401 (M. D. Ala. 1966), a federal district court held unconstitutional an Alabama statute excluding women from jury service. Another federal district court declined to do so with regard to a similar South Carolina statute. *Williams* v. *South Carolina*, 237 F. Supp. 360 (E.D.S.C. 1965). The United States Court of Appeals for the Fifth Circuit has agreed with *White*, expressing the view that the United States Supreme Court would now adopt the same view, *Bass* v. *Mississippi*, 381 F. 2d 692 (C.A. 5, 1967), and the Supreme Court of the State of Mississippi has expressly declined to follow *White*. *State* v. *Hall*, 1966 Miss. 187 So. 2d 861. The President of the United States has expressed concern with methods of jury selection which exclude any group from jury service. "It is not only the excluded group which suffers. Courts are denied the justice that flows from impartial juries selected from a cross section of the community." Message to Congress, April 28, 1966.

The record presented here would allow this court to approach this issue on narrow grounds. Women are not totally excluded from jury service in Kansas, but are exempt (KSA 43-116, Appendix A, A1). An affirmative statutory duty is, however, placed upon township and city assessors, requiring them, at the time of making the annual assessment of personal property, to inquire of each woman elector whether she desires to be exempt, listing for jury service those who do not claim the exemption (KSA 43-117, Appendix A, A1, A2). The record is clear in this case that the assessors in Lane County, Kansas, were not complying with this statutory duty (R. 6, Appendix C, A23, A24) and that this failure resulted from the method of taking personal property tax assessments (R. 7, Appendix C, A25). Methodology in the selection of jury panels, to secure juries representing a fair cross section of the com-

munity, is a matter of current concern in judicial administration, and the guidance of this court at this time would be most appropriate. See American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Trial by Jury*, May, 1968.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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